

**K-Mart Corporation and Walter C. Spencer. Case
17-CA-11121**

10 November 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 28 February 1983 Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ At par. 12 of the "Concluding Findings" section of the judge's decision, *Comet Fast Freight, Inc.*, is miscited. The correct citation is 262 NLRB 430 (1982).

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by Walter C. Spencer (hereafter called Spencer) against K-Mart Corporation (hereafter called the Respondent), the Regional Director for Region 17 issued a complaint and notice of hearing on September 8, 1982.¹ In essence, the complaint alleges that Spencer was warned, subsequently suspended, and later discharged for discussing job-related problems with fellow employees. The complaint asserts that, in discussing his problems with other employees, Spencer was engaged in protected concerted activity and that his suspension and discharge violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (herein called the Act). The Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied committing any unfair labor practices.

A hearing was held in this matter in Kansas City, Kansas, on October 7 and 8, 1982. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present relevant material evidence on the issues involved. Briefs were submitted by the parties and have been duly considered.

¹ Unless otherwise indicated, all dates herein refer to the year 1982.

Upon the entire record in this case, including my observation of the witnesses while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the retail sale of merchandise and maintains various facilities throughout the States of the United States, including a distribution center located in Lawrence, Kansas. During the course of its business operation within the State of Kansas, the Respondent annually purchases goods and services valued in excess of \$50,000 directly from sources located outside the State of Kansas. In addition, the Respondent annually derives a gross volume of business in excess of \$500,000 from its business operations within the State of Kansas. On the basis of the above, I find the Respondent is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The record discloses that Spencer had been an employee working at the Respondent's distribution center for a number of years. At the time of the events herein, Spencer was working as a truckdriver or hostler in the shipping department. His duties principally involved driving an Ottawa tractor² and transporting trailers into and out of the shipping dock area of the distribution facility. The Respondent operates two shifts at the distribution center with a third shift limited solely to work performed by a maintenance crew. There is one truckdriver per shift operating the Ottawa tractor and Spencer worked on the first shift.

The Respondent has established personnel policies and regulations governing the relationship between it and the employees. These policies and rules are set forth in an employee's handbook. (See G.C. Exh. 5.) Under the rule relating to written warnings issued to employees, the handbook provides:

A total of three written warnings for any type of violation of company policy within a twelve-month period is cause for termination

B. Warnings Issued to Spencer Prior to His Suspension and Discharge³

The warning issued on December 11, 1981: The record discloses that Spencer was given a written warning by

² The Ottawa tractor was constructed so that the cab would only accommodate the driver of the vehicle.

³ Spencer received two written warnings on December 11, 1981, and March 10, 1982, respectively. It is not alleged, nor does the General Counsel contend, that the warnings were issued in violation of the Act. Rather, the circumstances surrounding the issuance of these written warnings were detailed in the record to provide "background evidence" for the operative events herein, and also to establish that Spencer had received three written warnings within a 12-month period at the time of his discharge.

Gary Spreer, the personnel manager, on December 11 for "uncooperative attitude and conduct." (See G.C. Exh. 2.) This warning was issued to Spencer because of his conduct during a meeting between the shipping department employees and members of management on December 10. Spencer testified that the shipping department employees had been called to a meeting that day by Frank Evans, then manager of the shipping department.⁴ The purpose of the meeting was to allow the employees to vote on whether to retain or do away with the practice of having sectional seniority apply in bidding for jobs at the distribution center.

According to Spencer, the employees relations representative (apparently one of the rank-and-file workers) informed the shipping department employees that the elimination of sectional seniority would not impact on the "back-up" jobs which existed in the shipping department. But Evans then told the employees that the positions would in fact be affected if they voted to do away with sectional seniority.⁵ Spencer, along with several other employees, insisted that Johnson, the production manager, come to the meeting and explain the impact of the decision before the employees took a vote. Evans placed a call for Johnson but Spreer came in his place. As Spreer proceeded to discuss the matter with the employees, Spencer insisted that the employees wanted to talk directly with Johnson and not with Spreer. According to the testimony of Spreer and Evans, while other employees expressed concern over the issue, Spencer kept interrupting Spreer and insisting in a loud tone that the employees wanted Johnson to speak with them rather than Spreer. Spreer stated that, during the meeting, Spencer was pointing his finger in his (Spreer's) face and told him that he was not wanted there. Spreer insisted that the employees take a vote on the issue even though Spencer continued to demand that more time be given to the employees to discuss the matter. The following day, Spreer issued a written warning to Spencer because of his disruptive conduct at the meeting.⁶

The warning issued on March 10, 1982: The second written warning issued to Spencer involved an incident arising out of a directive to switch a trailer that was blocking merchandise in the shipping dock area. Spencer testified he received a directive over the two-way radio in the cab to move two trailers which were blocking merchandise needed by the case-pack department to fill a rush order. According to Spencer, as he drove the trailer into the "moat,"⁷ he saw employee Charles Russell and

asked which trailer Russell wanted moved. Russell replied that he did not want anything moved and, at that moment, employee Leann Barnhart drove her forklift down the ramp and stopped. Spencer stated that she stopped approximately 125 feet away from his tractor. Russell yelled at her to determine if she wanted a trailer moved and Barnhart pointed in the direction of two trailers which were at the platform. Spencer testified that when he looked in that direction he did not see that the trailers were blocking any merchandise. Spencer then received another call on the two-way radio directing him to pull two loaded trailers out from the shipping dock area into the yard area. Spencer responded to the second directive and had to wait some time in order to receive the seals to put on the loaded trailers. In the meantime, Ron Arnold, the assistant manager of the case-pack department, was complaining to Larry Oelschlaeger, the assistant manager of the shipping department, about Spencer's failure to move the trailers blocking the merchandise needed for the rush order. Although the statements of the witnesses vary, it is apparent that Spencer did not move the offending trailers until 30 to 40 minutes had elapsed from the time he first received the directive to do so.

When Spencer returned to the moat area, he was confronted by Arnold, who complained about the delay. During the confrontation, Spencer heatedly told Arnold that his duties were to move trailers in and out of the facility and not to accommodate the wishes of the case-pack department. He also stated that merchandise was not supposed to be placed in the shipping department. As a result of this incident, Oelschlaeger issued a written warning to Spencer for displaying an "insubordinate attitude." (G.C. Exh. 3)⁸

C. The Events Leading to the Suspension and Discharge of Spencer

Although the record is not clear as to the precise dates, it is evident from the testimony that, some time during the latter part of June or July, Spencer encountered two separate problems at work which caused him concern. The first of these involved grease on the airhoses and in the cab of the tractor. As noted, there was only one truckdriver operating the tractor on each of the two working shifts. Spencer began to find that, when he reported to work in the morning, the airhoses of the tractor were coated with grease and that grease was also in the cab of the tractor. The first time this occurred he cleaned it off, but the condition continued to persist. He then resorted to leaving notes for the second-shift driver but to no avail. Spencer testified that he brought the matter to the attention of his department manager, Ray King. He complained that the grease caused him to get his hands and clothes dirty. However, according to Spencer, no corrective action was taken by King. Spencer then spoke to an employee on the second shift to find out if some conflict, about which he was not aware, existed between him and the second-shift driver. In the

⁴ The Respondent followed a practice of periodically rotating its managers and assistant managers through each of its various departments.

⁵ The shipping department was the only department at the distribution center which had backup positions where employees could bid on jobs to replace regular employees when they were absent or ill.

⁶ Spencer's unrefuted testimony reveals that, several weeks after this incident, the Respondent changed its policy regarding matters on which employees were permitted to vote concerning their working conditions. According to Spencer, employees are now allowed 3 days to discuss a given issue before a vote is required.

⁷ This was the term used by the witnesses when referring to the shipping dock area. In addition to the doorway through which the tractor driver moves the trailers in and out of the facility, it is apparent from the testimony that there is a ramp leading down from the shipping dock to the area where the trailers are parked. This ramp is used by the operators of motorized forklifts to pick up skids or flats of merchandise needed by the various departments to fill orders.

⁸ In each instance that Spencer received a warning, he refused to sign it.

course of doing so, he ascertained that the driver was a new individual. Since the problem remained unresolved despite Spencer's complaints, he went to Martha Engnehl, then acting production manager, on July 20. Spencer expressed his concerns about the grease problems to her. He told Engnehl that he had brought the matter to the attention of his immediate supervisor but nothing had been done to correct the problem.

Apparently at the same time the grease problem was occurring Spencer experienced another problem involving his operation of the tractor and the operation of a forklift by a particular employee in the shipping dock area. Spencer testified that Barnhart continuously refused to "show courtesy" in the moat area by failing to yield the right of way to the tractor when he was moving trailers in and out of the facility. Spencer stated that a sign posted at the foot of the ramp required the forklift operators to yield to incoming traffic. Despite this, according to Spencer, Barnhart failed to yield to his rig and, on one occasion, he had to swerve to avoid hitting her when he was bringing a trailer into the area. Spencer testified that he complained to Manager King and Assistant Manager Arnold as well as to Pettingill, the safety manager. Spencer testified that Pettingill promised to have a meeting with the employees of the case-pack and nonconveyable departments regarding safety in the moat area and the allowance they had to make for the operation of the tractor in that vicinity.

Spencer stated that, despite his complaints to management about Barnhart, nothing was done to resolve the problem. The same day that he spoke with Engnehl about the grease problem, he went to her a second time and told her of his problem with Barnhart in the moat area. He testified that he explained to Engnehl that he had brought the matter to the attention of his supervisors, but nothing had been done to remedy the situation.⁹ Engnehl promised Spencer that she would look into his complaints and try to work something out.

The following day Spencer reported to work early in order to earn some overtime. He was informed by Engnehl that the matters which were causing him problems were being taken care of. At approximately 10 a.m. that day, Spencer was summoned to the conference room for a meeting with Clinton White, the general manager of the distribution center. Spreer, Engnehl, and King were also at this conference.

According to the testimony of Spencer, he was told by White not to discuss his problems with other employees because management did not want ill feelings created between the day- and night-shift workers. Spencer was questioned about his conversations with the employee on the second shift when he sought to ascertain whether some conflict existed between him and the second-shift truckdriver. Spencer testified that he responded to White by saying, "You can't tell me that I cannot talk to other employees." Spencer also told White that he had brought the grease problem to the attention of his manager but nothing had been done about it. Engnehl told Spencer that Barnhart reported that she ignored Spencer

when he drove in the moat area because he attempted to "crowd her out" with the tractor. Spencer was also told that employee Russell stated he was afraid of the speed at which Spencer operated the tractor in the moat area. According to Spencer, the meeting lasted for approximately an hour and a half. All of the management participants at the meeting testified that White cautioned Spencer not to discuss his problems during working time with other employees.

After Spencer left the meeting he returned to his duties on the tractor. John Parker, the security guard, testified that at approximately 11:30 that morning Spencer came to his guard shack at the gate. According to Parker, Spencer was to pick up an incoming trailer, but he had notified Spencer by means of the two-way radio 10 minutes earlier that the trailer had not arrived as yet. Parker stated that Spencer pulled up to the guard shack and got out of the tractor. Spencer said he wished management would get off of his back. He stated that he had made two legitimate complaints and management had been riding him ever since. Parker further testified that the conversation lasted approximately 5 minutes and that he made a notation of it in the guard's logbook.¹⁰

Dale Heston, assistant manager of the receiving department, testified that Spencer drove up in his area at approximately 11:40 a.m. and turned off the motor of the tractor. According to Heston, Spencer complained that management had passed him over again in the selection of group leaders. Heston stated that Spencer continued to discuss his complaints for approximately 15 minutes until the lunch bell rang. Heston also testified that, during the course of his conversation with Spencer, the employee was paged over the two-way radio several times to move some trailers. Heston stated that Spencer also mentioned he had been in a meeting with management and had been "raked over the coals." When Heston went to lunch he reported his conversation with Spencer to White.

Spencer admitted that he saw Heston when he returned to his tractor after the meeting with management in the conference room. Spencer further confirmed that he questioned Heston regarding the process of selecting group leaders and complained that his application had been rejected because of prior written warnings in his record. He also confirmed that he told Heston about his meeting with higher management and that he felt as if he had been "raked over the coals" because of his justifiable complaints. Spencer described the meeting with management to Heston as an interrogation session which lasted over an hour regarding matters which "should have been taken care of in three or four minutes."

Spencer further testified that, after his conversation with Heston, he returned to his duties until his lunch break. After eating, he walked out in the yard area and saw Russell, who was also on his lunch break. According to Spencer he asked if Russell had told management that he was afraid of the speed that Spencer operated the rig in the shipping dock area. Russell denied making this

⁹ Engnehl confirmed that Spencer told her he had discussed the matter with King and Arnold. The employee complained that nothing was done because they were "drinking buddies" of Barnhart.

¹⁰ During rebuttal testimony, Spencer stated that he had no recollection of speaking to Parker on July 21 about his meeting with management.

statement and told Spencer that he had informed management that he was afraid of the size of the rig but not afraid of the manner in which Spencer drove it. Spencer then told Russell about his meeting that morning with management and repeated that he felt as if he had been raked over the coals.

Russell also testified that he spoke with Spencer during his lunch hour, which he stated was between 12:15 and 12:45 p.m. When Spencer questioned him about his reputed statement, Russell denied making it. He informed Spencer that he told management he was afraid of the size of the equipment but not the manner in which Spencer drove it.¹¹

Russell further stated that at approximately 1:40 p.m. he was informed by his then supervisor (Eubanks) to report to White's office because it was the date of the ninth anniversary of his employment with the Respondent.¹² During the course of the congratulatory interview, Russell was asked if he had any problems. Russell took his opportunity to complain to White about his statement regarding his fear of the size of the tractor being misinterpreted by management as a fear regarding the manner in which Spencer drove the equipment. He revealed to White that Spencer had mentioned to him that Spencer had been in a meeting that day with management in which he had been raked over the coals, and that Russell was purported to have told management that he was afraid of the speed that Spencer operated the tractor in the shipping dock area. Russell told White this was not true and asked him to clear the matter up because he was caught in the middle.

White, on the other hand, testified that he had the anniversary interview with Russell at 11:35 a.m., shortly after the conference with Spencer.¹³ He stated that Russell questioned him about the problem between Spencer and Barnhart. According to White, Russell said Spencer had informed him that Spencer had just left the meeting with management where he had been raked over the coals and Russell's name was mentioned. White testified he became irritated because he had just advised Spencer not to discuss his problems with other employees during working hours.

Barbara Button, a general maintenance employee whose duties included cleaning up in the front office area, testified that she saw Russell go into White's office between 10:30 and 11:30 that morning. Button stated she remembered the occasion because, in her words, "it was unusual for warehouse employees to go into White's office." On cross-examination, however, Button admitted

that the Respondent employed close to 400 employees at the distribution center and each at one time or another goes into White's office for anniversary interviews or to discuss problems with him. She also admitted that she voluntarily offered to testify on behalf of the Respondent because she "disagreed" with Spencer and the way he acted at work.

At approximately 3 p.m., Spencer was called to the conference room again by White. Engnehl, Heston, King, and Spreer were also present. Spencer testified that White asked if he had talked with any employees since leaving the conference that morning and whether he told them he had been raked over the coals. Spencer admitted that he had. Then, according to Spencer, White indicated that he knew Spencer had spoken to Heston and Russell and he asked the employee why he felt he had been raked over the coals. When Spencer explained he felt that way because of the manner in which he had been interrogated over two justifiable complaints, White reminded him of the admonition not to discuss his problems with other employees. White thereupon told Spencer he was suspended. Spencer testified that he requested to have an employee relations representative present and White replied that management would meet with an employee representative after Spencer left the premises. According to Spencer, White stated that as far as he was concerned Spencer was terminated unless management changed its mind. Spreer told Spencer not to return to work unless he was notified to do so.

White and the management personnel attending this second conference with Spencer testified that, when questioned about discussing his problems with other employees, Spencer stated he would talk to "whomever he wanted to whenever he wanted to."¹⁴ At this point, according to White, he suspended the employee pending further investigation of his conduct.

Russell was called to the conference room at approximately 3:45 p.m. that day. He was told that Spencer had been suspended but that nothing Russell said had influenced that decision. According to Russell, management stated Spencer was suspended for discussing matters outside the conference room with other employees.

The following day Spencer was called at home and told to report to Spreer's office. When he did so, Spreer informed the employee that management had reviewed the incident of the prior day and decided to give him a written warning for "insubordinate and uncooperative attitude and conduct." (See G.C. Exh. 4.) After Spencer protested, Spreer informed the employee that he was terminated for having received three written warnings within a 12-month period.

That evening, Spencer went to Russell's home. According to Russell, Spencer was quite upset over his termination and the statement that Russell was alleged to have made about his driving in the shipping dock area. Russell promised that he would go to management and try to clear it up. The next day, Russell spoke with Engnehl about his matter. He complained that management had placed him in the middle regarding Spencer's dis-

¹¹ According to Russell, in April 1981, Pettingill asked him if he were afraid of the speed at which Spencer drove the tractor and his response was the same as he had given Spencer. Again in March 1982 (after Spencer's second written warning), Spreer asked the same question of Russell who assured Spreer that he had no complaints about Spencer's driving and demanded that the matter be cleared up. Russell further stated that 2 days before Spencer's suspension Engnehl asked him the same question and he repeated that he was afraid of the size of the equipment but not the manner in which Spencer operated it.

¹² White followed a practice of calling in each employee on the anniversary date of his or her employment with the Respondent for a congratulatory interview.

¹³ Eubanks was called as witness. He testified that he sent Russell to White's office for the anniversary interview before the employee's lunch hour. Eubanks fixed the time at 11:30 a.m.

¹⁴ Spencer denied making this comment, stating that he would not have placed his job in jeopardy since he already had two "write-ups."

charge. Engnehl assured Russell that he had nothing to do with the decision to fire Spencer. She told Russell that Spencer was discharged for insubordination because he talked outside the conference room when management asked him not to do so and "for complaining too much."

One other witness testified in this proceeding on behalf of the Respondent. Larry Shorter, supervisor of the general maintenance crew and Russell's current supervisor, testified that on September 22 Russell spoke to him about Spencer. According to Shorter, Russell confided that he was afraid of Spencer and that Spencer was a Vietnam veteran. Shorter stated Russell not only indicated he was in personal fear but also that he feared for the safety of his family.

Russell was recalled as a witness and emphatically denied Shorter's statements. Russell testified that he had received a subpoena to testify at an unemployment compensation hearing for Spencer. Since he did not have any available leave time, he showed the subpoena to Shorter and asked him to take it up with higher level management in order to get authorization to go. Shorter returned and told Russell that management said, "Do whatever you think best." Russell then insisted on talking directly with White or Johnson.¹⁵ Shorter then asked Russell how he got involved in the matter and Russell told him that Spencer was upset over losing his job and that he was a Vietnam veteran. According to Russell, Shorter wanted to know if Spencer had harassed him or if he were afraid of Spencer. Russell replied, "No. Not at all."

Concluding Findings

While the testimony detailed in this case far exceeds that which is necessary to decide the issues involved, it does present critical credibility questions which must be resolved before reaching the ultimate question of whether a violation of the Act has been committed.

Foremost in this regard is the question of whether Russell informed White *prior* to his lunch hour that Spencer had discussed with him the conference that had taken place with management that morning. Both Russell and Spencer testified they did not discuss Spencer's meeting with management until their lunch hour (between 12:15 and 12:45 p.m.), and Russell testified he did not go into White's office for the anniversary interview until approximately 1:40 p.m. Contrary to this, White testified he met with Russell at 11:30 a.m.—shortly after the termination of the conference with Spencer. Testimony from Eubanks and Button was offered to corroborate the fact that White met with Russell *before* the employee's lunch hour.

Considering not only the demeanor of the witnesses testifying on this issue but also the inherent probabilities and other objective factors, I find the testimony of Russell and Spencer to be more reliable and worthy of belief than the testimony offered by the Respondent's witnesses. First, while it was evident that Russell was a friend of Spencer, this factor is far outweighed by the

candid and forthright manner in which Russell testified generally and about this event in particular. Equally important in the determination that Russell's testimony was worthy of belief is the fact that he was still employed by the Respondent at the time of the hearing and, as such, was testifying against self-interest—a factor not to be lightly disregarded. See *Shop-Rite Supermarket*, 231 NLRB 500 (1977); *Southern Paint & Waterproofing Co.*, 230 NLRB 429, 431 fn. 11 (1977); *Astrosystems, Inc.*, 203 NLRB 49 (1973); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), *enfd.* as modified 308 F.2d 89 (5th Cir. 1962). The Respondent's ill-conceived attempt to show that Russell's testimony was inspired by fear of Spencer only serves to buttress the conviction that Russell was accurately describing the events in which he played a role. The testimony of Shorter, purporting to show that Russell admitted fear of Spencer, was evasive, vague, and completely unreliable. Furthermore, Shorter's testimony was thoroughly refuted by Russell on rebuttal when he gave a detailed recital of the circumstances involving his conversation with Shorter. The fact that the Respondent deliberately attempted to distort the plain meaning of this conversation in an effort to discredit Russell's testimony merely reinforces the conclusions that the employee's testimony was a reliable account of the events.

Nor does the testimony of Button and Eubanks serve to alter this finding. Button was admittedly biased against Spencer because she did not approve of the manner in which he conducted himself at work. For this reason, she volunteered to assist management in any way she could regarding the matter involving Spencer. Moreover, her testimony was less than precise in that she placed Russell in the "front office" area some time between 10:30 and 11:30 the morning of July 21. She was only certain that it occurred before her lunch hour. However, she admitted she cleaned up in the same area in the afternoon and, further, that it was not unusual, as she first stated on direct examination, to see warehouse employees come into White's office. Similarly, Eubanks' testimony that he directed Russell to report to White's office at 11:30 a.m. appears to be contrived and fabricated solely to support the claim that Russell met with White before his lunch hour. For these reasons, I completely discredit the testimony of Button, Eubanks, and Shorter.

Finally, I also find that White's testimony that Russell spoke to him about Spencer prior to the employee's lunch break to be less than convincing. By his own admission, White was irritated over the fact that Spencer continued to complain to others about his problems after having been admonished by White at the morning conference not to do so. It is highly improbable that White would have waited until 3 p.m. that afternoon to call the employee in to confront him with evidence of the failure to follow his instructions. I find this to be all the more improbable since, according to White, he possessed knowledge of this disregard of his instructions prior to the end of the lunch hour. White's explanation that he had to turn his attention to other matters is hardly per-

¹⁵ Management subsequently gave Russell permission to leave work to attend the hearing.

suasive in view of his admitted strong irritation over Spencer's apparent willful disregard of his directives.

In sum, I credit the testimony of Spencer and Russell as to the time Russell informed White that Spencer had complained about his meeting with management on July 21. Thus, I find that it was during the noon lunch hour that White gained knowledge that Spencer had complained to Heston and that it was some time after 1:40 p.m. before he became aware that Spencer had also complained to Russell about his conference with management that morning.¹⁶

On the basis of the above, the credited facts become condensed to the following: (1) that Spencer complained to a second-shift employee and to management about the problem he was experiencing with grease on the airhoses and inside the tractor; (2) that Spencer complained to management about the problem he was experiencing in the shipping dock area with Barnhart over her failure to "show courtesy" by yielding the right of way of his tractor; (3) that, during the morning conference with management on July 21, White warned Spencer not to discuss his problems with other employees during working time;¹⁷ (4) that, after the morning conference, Spencer complained to Assistant Manager Heston about his failure to be selected as a group leader and about his feelings regarding the earlier conference with high-level management that morning; (5) that during their lunch hour Spencer told Russell of his feelings regarding the conference he had concerning his complaints with management, and that he questioned Russell concerning a statement Russell was alleged to have made about the manner in which Spencer drove the tractor in the shipping dock area; (6) that, at approximately 1:40 p.m., Russell informed White that Spencer had discussed the morning conference with him, and that Russell complained because he felt his statements about his fear regarding the size of the equipment had been misconstrued by management in their dealings with Spencer; (7) that Spencer was called to a second conference with White at 3 p.m. and confronted with the statements he made to Heston and Russell about the morning conference; (8) that during this second conference Spencer told White "[he] would talk to whomever [he] wanted, wherever [he] wanted";¹⁸ and (9) that, after Spencer's comment,

White suspended the employee and the following day White caused a third written warning to be issued which resulted in his termination.

This brings into focus the central issue involved in this case. This question is whether Spencer was involved in protected concerted activity when: (1) he spoke to the second-shift employee about the problem he was experiencing with the grease on the tractor equipment; (2) he talked with Heston prior to lunch about management's failure to select him as a group leader and the fact that he had been in a meeting with management in which "he had been raked over the coals"; and (3) he spoke to Russell during their lunch hour about the meeting he had with management concerning his complaints, and questioned Russell about his purported fear over the speed which Spencer operated the tractor in the shipping dock area. On the basis of the record here, I find that Spencer was not engaged in conduct which falls within the protection of the Act.

As the Board has stated in the relatively recent case of *Mills Patrol Service*:¹⁹

In order for activity to be protected by Section 8(a)(1), it must be concerted in nature. Where it is shown that an employee is acting for his own individual benefit without the support of his co-workers, there can be no finding of concerted activity.

In the instant case, it is evidence that Spencer was acting solely for his own individual benefit and that he was doing so without the support of his coworkers. That the matter of the grease in the tractor and on the airhoses was distasteful to him is without question. But there is no indication whatsoever that his complaints or comments to fellow employees were intended to induce group activity by having the hearer of the complaints make common cause with him over the matter. Nor was the resolution of the grease problem a situation which would benefit other employees. See *Koch Supplies v. NLRB*, 646 F.2d 1257 (8th Cir. 1981).

In a similar vein, Spencer's complaint over what he considered to be Barnhart's failure to "show courtesy" by yielding to the tractor when he drove in the shipping dock area was also a personal complaint which was not calculated to benefit other employees. Granted, it may be said that safety in the manner in which vehicles were operated in the shipping dock area was a matter of concern for all employees, it is clear from the testimony that Spencer's main concern was to cause Barnhart to yield the right of way to his vehicle when he was in the area. It is equally evident, that Barnhart took the position that she had as much right to operate her vehicle there as did Spencer and that she felt he deliberately attempted to crowd her out. Therefore, Spencer's complaint related to what he perceived as being the courtesy due the operator of the tractor as opposed to the operation of the motorized forklift truck by Barnhart. Thus, it is clear that Spencer was not seeking to get his coworkers to make common cause with him concerning this issue but, rather, he was attempting to enforce a right he felt he

¹⁶ It is apparent from the testimony that White did not mention the purported conversation with Parker in the guardhouse shack when he confronted Spencer during the second conference that day. Therefore, I do not find it necessary to resolve any conflict in the testimony as to whether this conversation took place.

¹⁷ Although Spencer testified that White said not to discuss his problems with other employees and did not limit the admonition to working time, I do not credit him in this regard. I find that this portion of his testimony was carefully tailored to buttress his position in these proceedings. However, this does not cause me to find that Spencer's testimony was unreliable in all respects. Indeed, "nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness's testimony." *Durango Boot*, 247 NLRB 361 fn. 2 (1980), citing Judge Learned Hand's observation in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

¹⁸ Although Spencer denied making this comment, I do not credit him. This statement was consistent with his past conduct when confronted by supervisors regarding his actions. For the reasons cited in fn. 17, supra, I find his explanation as to why he would not have made such a comment to be unpersuasive.

¹⁹ 264 NLRB 323 (1982).

was entitled to enjoy when operating the tractor in the shipping dock area.

When Spencer spoke to Heston and Russell after his meeting with management on July 21, he was simply continuing to complain about problems which related solely to him. Accordingly, I find that Spencer was not engaged in any activity which could be construed as being protected by the Act. In short, Spencer was pressing his grievances and complaints for his own personal benefit, and such conduct does not rise to the level of protected concerted activity. *Mills Patrol Service*, supra; *Koch Supplies v. NLRB*, supra. Cf. *Comet Fast Freight*, 260 NLRB 377 (1982).

CONCLUSIONS OF LAW

1. The Respondent, K-Mart Corporation, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act by instructing Walter C. Spencer not to discuss his problems with employees during working time or by suspending, issuing a written warning to, and subsequently terminating Spencer for refusing to comply with these instructions.

On the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I issue the following

ORDER²⁰

The complaint herein is dismissed in its entirety.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.